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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. ~~1281~~ 93

PUBLIC SERVICE ELECTRIC AND GAS COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION, TRANSCONTINENTAL GAS PIPE LINE CORPORATION AND TEXACO, INC.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Public Service Electric and Gas Company, Petitioner in the proceeding below, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on March 2, 1967.

Opinions Below

The Opinion of the Court of Appeals, issued January 18, 1967, is reported at 371 F. 2d 1. The Opinion and the Court's Judgment are reprinted herein as Appendix A *infra*, pp.

1a-12a). Opinion No. 449 and Order of the Federal Power Commission issued February 17, 1965 are reported at 33 F. P. C. 237. Opinion No. 449-A and Order on petition for rehearing before the Federal Power Commission issued April 16, 1965 are reported at 33 F. P. C. 818. The opinions and orders of the Federal Power Commission are reprinted at pages 271 and 299 of the Joint Appendix. The Examiner's decision is reported at 33 F. P. C. 242 (1964) and is reprinted in the Joint Appendix at page 167.

Jurisdiction

The Opinion of the Court of Appeals for the Third Circuit was issued on January 18, 1967 and Judgment was entered on March 2, 1967. The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1) (1948) and Section 19(b) of the Natural Gas Act, 52 Stat. 831 (1938); 15 U. S. C. §717r(b).

Questions Presented

1. Is the physical fact of original commingling and flow of natural gas sufficient to require the Federal Power Commission to assert jurisdiction over the entire transaction, within the meaning of the Natural Gas Act, where a producer delivers gas in Texas or Louisiana to a pipeline transmission company for interstate transportation and the pipeline company is obligated to deliver substantially the same volume of gas to the producer in New Jersey?

2. Is there a "sale for resale" within the meaning of Section 1(b) of the Natural Gas Act, when a producer delivers its gas to an interstate pipeline company in Texas and Louisiana and the pipeline commingles that gas with other gas admittedly in interstate commerce and delivers approximately the same volume of gas to the producer for use in the producer's refinery in New Jersey?

3. Is there a "transportation of natural gas" within the meaning of Section 1(b) of the Natural Gas Act by a consumer, when an interstate pipeline company delivers natural gas it transported in interstate commerce to a consumer in New Jersey and the consumer continues to transport the gas at high pressure some 4½ miles through public and private lands to its refinery?

4. Is there a denial of "Fair Administrative Procedure" where an Agency Hearing Examiner arrives at an essential finding herein by making his own calculations on material extracted from a bare application filed in a subsequent and unrelated docket on which the Agency held no formal hearing?

5. Did the Court err in affirming the Commission where the record does not substantiate the findings that the present or future public convenience and necessity *required* the issuance of the certificate within the meaning of Section 7(e) of the Natural Gas Act?

Statutes Involved

The statutory provisions involved are §§ 1(b), 7(c), 7(e) and 19(b) of the Natural Gas Act, 52 Stat. 821 (1938), as amended, and 15 U. S. C. §§ 717(b), 717f(c), 717f(e) and 717r(b). Also involved is Section 556(d) of the Administrative Procedure Act, 5 U. S. C. 556(d). These Sections are set forth in Appendix B, pp. 13a-17a.

Statement of the Case

The proceedings below were instituted by the filing of an application by Transcontinental Gas Pipe Line Corporation (Transco) on February 3, 1963, supplemented on three occasions, by which it sought a certificate under Section 7(c) and (e) of the Natural Gas Act for authority to transport

natural gas for Texaco, Inc. (Texaco) from the States of Louisiana and Texas to Westville, Gloucester County, New Jersey. From the point of delivery in Westville, Texaco would transport the gas some 4½ miles in its own converted 8-inch pipeline to its New Jersey refinery at West Deptford described as the Eagle Point Refinery. The proposal is set forth in a contract between Transco and Texaco dated February 7, 1963 (R. 132-157).[1]

The agreement provides that Texaco will deliver up to 8,000Mcf per day of firm gas and up to 16,000 Mcf per day of interruptible gas to Transco in Texas or Louisiana. Transco in turn will deliver approximately the same volumes of gas to Texaco in New Jersey. The parties recognize that due to operating conditions, deliveries into and deliveries from Transco's line may not balance on a daily or very short term basis. Thus, the contract provides that the quantities of gas delivered by Texaco into Transco's lines shall be balanced against the withdrawals by Texaco within thirty days. The term of the contract is for a period of twenty years.

Texaco will deliver the gas to Transco at a point in the South Clara Driscoll Field, Nueces County, Texas, or at the tailgate of Texaco's Paradis Gasoline Plant, St. Charles Parish, Louisiana, or at such other point or points in Texas or Louisiana as may be mutually agreeable. Transco, however, shall never be obligated to receive at the Texas delivery points a total daily volume in excess of 10,000 Mcf.

The contract sets forth the fact that the parties recognize that the Texaco gas will be commingled in Transco's

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[1] "R." references are to the Joint Appendix in the Court of Appeals filed in this Court with the petition for certiorari to review the Court of Appeals decision.

pipeline system with gas received from other sources and that the specific gas delivered by Texaco to Transco cannot be redelivered to Texaco. Hence, the contract contains provisions respecting the quality of the gas to be delivered by both parties. The gas delivered by Transco to Texaco must be odorized.

The rates to be charged by Transco are 22¢ per Mcf for the interruptible deliveries and 22.04¢ per Mcf for the firm deliveries.

In lieu of a dedication of reserves for the firm deliveries, Texaco warrants that it will maintain natural gas reserves to insure the availability for deliverey of 8,000 Mcf per day for a period of twenty years. This warranty does not apply to the interruptible deliveries.

In the application, Transco also sought authority to construct and operate certain gathering, pipeline, compressor and metering facilities.

Texaco filed no application but participated as an intervenor in support of Transco.

Petitioner, in whose franchised territory Texaco's Eagle Point Refinery is located, filed a petition to intervene in opposition to Transco's application. Six other distribution companies likewise filed petitions to intervene in opposition.[2] The Board of Public Utility Commissioners of the

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[2] South Jersey Gas Company (South Jersey); Elizabethtown Consolidated Gas Company (Elizabethtown Consolidated); City Gas Company of New Jersey (City Gas); Philadelphia Electric Company (Philadelphia Electric); Philadelphia Gas Works Division of the United Gas Improvement Company (Philadelphia Gas Works); New Jersey Natural Gas Company (New Jersey Natural). All of these intervenors, including Public Service, are customers of Transco except New Jersey Natural which is a customer of South Jersey.

State of New Jersey filed a Notice of Intervention and opposed the certificate application. All petitions to intervene were granted by Order dated October 29, 1963.

The Commission ordered a hearing which was convened on October 29, 1963 and was concluded on January 29, 1964, after eight nonconsecutive hearing days. Evidence was presented by Transco and Texaco in support of the application. The distribution company intervenors presented evidence in opposition.

The Presiding Examiner issued an Initial Decision on June 5, 1964, in which he recommended the issuance of a certificate, for the most part as requested by Transco (R. 167-237). The Commission's Order of August 25, 1964, granted the motion of the distribution company intervenors requesting oral argument on their exceptions to the Examiner's Initial Decision (R. 250). In that Order the Commission, *sua sponte*, raised the following issue: "(5) Whether the arrangement between Texaco and Transco involves a sale of gas by Texaco to Transco for resale by the latter so that the producer should be required to secure a certificate." The Commission, after oral argument held October 20, 1964, decided against jurisdiction, adopted the Examiner's Decision, and by its Orders of February 17, 1965 (R. 271-281) and April 16, 1965 (R. 299-304), issued a certificate of public convenience and necessity to Transco.

Review was sought by Petitioner in the United States Court of Appeals for the Third Circuit. The Court below affirmed the Commission's orders. It declined to adopt the commingling or molecular theory as controlling on the issue of jurisdiction and held that jurisdiction in *Lo-Vaca* and *Amerada* was sustained on facts not present in this case.[3]

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[3] *California* v. *Lo-Vaca Gathering Co.*, 379 U. S. 366 (1965); *F. P. C.* v. *Amerada Petroleum Corp.*, 379 U. S. 687 (1965).

The Court likewise rejected Petitioner's contention that the exchange of gas between Texaco and Transco was in reality a sale and thus Commission jurisdiction should be asserted. Instead the Court said, the exchange should be viewed as a bailment. The Court denied that the transportation by Texaco of the gas in its pipeline for approximately four miles over public and private lands is a "transportation of natural gas" within the meaning of Section 1(b) of the Act because it viewed Texaco's pipeline as a plant facility. Finally, the Court rejected what it termed "Challenge To Findings Of Fact" stating that the Commission had given careful consideration to all the factors bearing on the public interest. However, it did not delineate the basis for such conclusion.

Reasons for Granting the Writ

A. The commingling or molecular doctrine alone supports jurisdiction.

This case presents the issue as to whether in spite of original commingling of gas there might be a separate so-called nonjurisdictional transaction of a precise amount of gas not-for-resale within the meaning of the Natural Gas Act. This Court expressly stated that this issue need not be reached in the *Lo-Vaca* and *Amerada* cases; *California* v. *Lo-Vaca Gathering Co.*, 379 U. S. 366 (1965): *F. P. C.* v. *Amerada Petroleum Corp.*, 379 U. S. 687 (1965). In those cases the Commission successfully contended that the jurisdictional status of a sale was governed by the physical facts of the flow of gas and not by the bare recitals of contract. The Commission *asserted* jurisdiction in those cases, and, thus, this Court in *Lo-Vaca* at page 370 said:

> "* * * Whether cases could be conjured up where in spite of original commingling there might be a sep-

arate so-called non-jurisdictional transaction[3] of a precise amount of gas not-for-resale[4] within the meaning of the Act is a question we need not reach."

"[3] Our reference in *Federal Power Comm'n* v. *Transcontinental Gas Pipe Line Corp.*, 365 U. S. 1, 4, to 'direct' sales of gas to industrial users as non-jurisdictional sales is not dispositive of the present issue. For the Commission had refused a certificate for transportation of the gas because from the standpoint of conservation it considered the end use as boiler fuel to be inferior. Whether the Commission had authority to assert jurisdiction over the so-called 'direct' sale because it was 'for resale' as a result of its commingling with other gas was not in issue.

"[4] *Cf. United States* v. *Public Utilities Comm'n*, 345 U. S. 295, 317-318; *City of Hastings* v. *Federal Power Comm'n*, 221 F. 2d 31."

To the same effect was the Court's statement in *Amerada*:

"* * * Thus, here, as in *Lo-Vaca*, we need not and do not reach the issue of whether 'in spite of original commingling there might be a separate so-called nonjurisdictional transaction of a precise amount of gas * * *' 379 U. S., at 691."

However, in this case, the Commission *disclaimed* jurisdiction and held that the commingling of natural gas with admittedly jurisdictional gas for resale did not compel Commission jurisdiction over the whole. It said:

"We conclude that the mere physical commingling of Texaco's gas in Transco's lines with gas Transco has purchased for subsequent resale does not compel rejection of historic notions of bailments

and require us to transform the transportation agreement into a succession of sales, by Texaco to Transco and again by Transco to Texaco. * * *" (R. 279).

The Court below also rejected the molecular theory and held that the physical commingling of Texaco's gas in Transco's lines with gas Transco has purchased for subsequent resale involved nothing more than a bailment of a fungible commodity and thus was not a jurisdictional transaction.

This decision clearly created a regulatory gap. Such a "gap" is directly opposed to the intent of Congress in enacting the Natural Gas Act. In the X-20 case, *F. P. C. v. Transcontinental Gas Pipe Line Corp.*, 365 U. S. 1, this Court said at page 28, "* * * Congress did not desire an 'attractive gap' in its regulatory scheme * * *" and that it "* * * intended to impose a comprehensive regulatory system on the transportation, production, and sale of this valuable natural resource. * * *" Despite the clear mandate from this Court defining the Congressional intent, the Court below upheld the Commission's creation of a regulatory gap and held that the doctrine of commingling as applied in *Lo-Vaca* and *Amerada* has no application here because of the absence of "a jurisdictional sale for either consumption or resale".

The Commission, using this decision as a springboard, has already decided to "widen" the gap and in its recent Opinion No. 516, *Florida Gas Transmission Company*, Docket No. CP65-393, issued March 1, 1967, —— F. P. C. ——, held that even where there is a sale of natural gas in the field by a producer to an electric generating company, to be transported in interstate commerce by a natural gas pipeline company, that it does not have jurisdiction over the sale in the field.

Thus, it is plain, a grave federal question is raised by the decision below as to the scope of the statutory jurisdiction of the Federal Power Commission in its administration of the certificate provisions of the Natural Gas Act.

This jurisdictional issue should be resolved by this Court because the Court below, in refusing to apply the commingling doctrine, relied on the fact that this Court expressly stated that it need not reach the question of whether commingling alone is sufficient to invoke jurisdiction in either *Lo-Vaca* or *Amerada*. The Court below, as we have noted, held that these cases had no application because of the absence of a jurisdictional sale for either consumption or resale. Further, the Court below concluded that the arrangement was not devised to avoid jurisdiction and that it involved nothing more than the bailment of a fungible commodity. We respectfully contend that the Court below erred in holding that the commingling doctrine is non-applicable.

The jurisdictional determination in the present proceeding will create a class of transactions which will be free from effective regulation. It provides an escape from the comprehensive regulatory scheme Congress established for the protection of natural gas consumers. This Court made it clear that the Commission must resolve jurisdictional issues with a view to the substance, not merely the form of a gas sale transaction, *California* v. *Lo-Vaca Gathering Co.*, 379 U. S. 366 (1965). In that case, this Court recognized that the purportedly nonjurisdictional gas would be commingled in the transmission pipeline with gas destined for jurisdictional markets. Therefore, it adopted the rule of molecular flow and held that the Commission's jurisdiction was tied to the physical realities of gas flow rather than to contractual stipulations of the parties. This was

a reapproval of the jurisdictional test formulated in the earlier decision in *Connecticut Light & Power Co.* v. *Federal Power Commission*, 324 U. S. 515 (1945), wherein it was held that jurisdiction should follow the flow of electric energy which provided an engineering and scientific test rather than a legalistic or governmental test. This holding was also emphasized in the *Colton* case, a case wherein this Court noted the similarities of Sections 201(b) of the Federal Power Act and Section 1(b) of the Natural Gas Act in reaching its determination upholding jurisdiction, *F. P. C.* v. *Southern California Edison Co.*, 376 U. S. 205, 209, n5 (1964).

It is evident that the Court below seemed to place some reliance on its interpretation of the intent of the parties in entering this type of a transaction for it said, "Further, the arrangement between Texaco and Transcon was not devised to avoid regulation; * * *". Petitioner contends that this is irrelevant. The end result is that Texaco avoids jurisdiction completely. In *United Gas Improvement Co.* v. *Continental Oil Co.*, 381 U. S. 392 (1965) at page 400, this Court in upholding jurisdiction said:

> "Without impugning in any way the good faith and genuineness of the transactions, we think it clear that the lease-sales here in question can nonetheless be considered 'sales' of natural gas * * *."

Again, in *California* v. *Lo-Vaca Gathering Co.*, this Court upheld jurisdiction even though Justice Harlan pointed out in his dissent that the good faith of the parties to the litigation has not been impugned in any way (366 U. S. 377). Thus, the end result of the avoidance of regulation transcends the question of whether or not the parties deliberately intended to avoid regulation.

The decision of the Court below is in direct conflict with the decision of the United States Court of Appeals for the

Fifth Circuit in *Louisiana Public Service Commission* v. *F. P. C.*, 359 F. 2d 525 (1966). In that case United Gas Pipeline Company mixed natural gas in its pipeline and sold some of the gas at wholesale in Louisiana where the gas was produced and also sold some of the gas in other states. The Court held that the *Lo-Vaca and Amerada*[4] decisions clearly held that the mixing of intrastate gas with a substantial portion of interstate gas for pipeline transportation in one commingled stream gave the Commission jurisdiction "at the outset over the entire transaction".

The Third Circuit did not directly meet the issue of whether "commingling" itself was sufficient to confer jurisdiction on the Commission but did state that the absence of a jurisdictional sale caused it to reject the doctrine of commingling. The inference is that the Court below held that original commingling without more is insufficient to support jurisdiction. This we believe was error. The Court below completely ignored the Supreme Court's admonition in *Lo-Vaca* that if the parties "* * * were free to allocate gas for a particular use, havoc would be raised with the federal regulatory scheme." (379 U. S. 369). Therefore, it is submitted that consumer protection requires that this Court should determine whether commingling or molecular flow itself should be the test to be applied by the Commission in determining its jurisdiction.

B. The Commission should be required to assert its jurisdiction because the exchange transaction is a "sale for resale".

Aside from the issue of whether or not the "Commingmingling Doctrine" in itself supports jurisdiction, this

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[4] *California* v. *Lo-Vaca Gathering Co.*, 379 U. S. 366 (1965); *F. P. C.* v. *Amerada Petroleum Corp.*, 379 U. S. 687 (1965).

case presents the question of whether an exchange of gas should be considered to be a sale or a bailment. It has frequently been held that there is no substantial difference between a sale and an exchange and the legal effect of a contract of exchange is generally the same as that of a contract of sale. In law, an exchange is recognized as two sales. Title is absolutely transferred in both a sale and an exchange (33 C. J. S. §§1(b)).

The Court below held that the instant transaction amounted to nothing more than the bailment of a fungible commodity because a transfer of title was not intended by the parties. Petitioner contends that there was a definite transfer of title based on two undisputed facts, *i.e.*: (1) Article 12 of the contract between Transco and Texaco provided that Transco would assume the risk of loss while the gas was in its possession, and (2) Article 10 of the General Terms and Conditions applicable to all of Transco's filed F. P: C. Rate Schedules set forth in its Gas Tariff provides that:

> "Seller agrees that it will and it hereby does warrant for itself, its successors and assigns, that at the time of delivery it will have good title to all natural gas delivered by it to Buyer, free and clear of all liens, encumbrances and claims whatsoever * * *."

Obviously Transco and Texaco intended that title to the Texaco delivered gas would pass to Transco because the contract states that Texaco will not receive its identical gas and both parties had or should have had knowledge of the terms of the Tariff.[5] Both the Commission and the Court simply ignored Petitioner's argument with respect to the Tariff provision regarding title. We can only con-

[5] Reference is made in the contract to Transco's filed Tariff.

clude from this that, silence gives consent, at least to the conclusion that under Transco's Tariff title necessarily passed.

Thus, with a transfer of title, this exchange should be viewed as a sale and not a bailment. Such a holding is necessary in order to avoid a "regulatory gap" and would be completely consistent with this Court's holding in the *Rayne Field* case, *United Gas Improvement Co.* v. *Continental Oil Co.*, 381 U. S. 392 (1965). In *Rayne Field*, Texas Eastern purchased leases of natural gas from producers in Louisiana. A sale of gas in place is not recognized by Louisiana law, so Texas Eastern contended that, as there was no sale of natural gas, the Commission had no jurisdiction. The Commission asserted jurisdiction and said to decide otherwise "would exalt form over substance, would give greater weight to the technicalities of contract draftsmanship than to the achievement of the purposes of the Natural Gas Act, and would impair our ability to control the price received for gas sold to the pipelines in interstate commerce to the detriment of the ultimate consumers", *Texas Eastern Transmission Corp.*, 29 F. P. C. 249, 256.

This Court upheld the Commission and said:

> "Without impugning in any way the good faith and genuineness of the transactions, we think it clear that the lease-sales here in question can nonetheless be considered 'sales' of natural gas in interstate commerce for purposes of the Act. A regulatory statute such as the Natural Gas Act would be hamstrung if it were tied down to technical concepts of local law. * * *" (381 U. S. 392, 400).

The Commission and the Court below decided to view the instant transaction as a bailment of fungible goods in or-

der to defeat jurisdiction. Yet, it should be noted that the Commission reverted to its earlier position[6] in the *Sayre Field* case (*Natural Gas Pipeline Co. of America,* Opinion No. 480 (Nov. 8, 1965)), 34 F. P. C. 1258, and held that bailments and fungibility were not pertinent concepts under the Natural Gas Act. The Commission stated:

> "* * * Recognizing that as a matter of contract law the transaction might well be characterized as a bailment for hire, we think it clear that insofar as its status under the Natural Gas Act is concerned, it must be construed as a sale. * * *" (34 F. P. C. 1263).

The Commission further held that the delivery and redelivery of equivalent volumes of natural gas constituted an exchange, and, thus, a sale within the meaning of the Natural Gas Act. The Commission said:

> "* * * The situation here is analogous to the situation where a pipeline takes gas in one part of its line in exchange for a consideration of a promise to provide the seller with an equivalent amount of gas at another point on the pipeline. Such exchanges have always been construed as involving sales and resales of gas. * * *" (34 F. P. C. 1263, 1264).

The complete about-face of the Commission in holding that in this proceeding it would not accept the concept that an exchange amounts to two sales and that it would cling to "historic notions of bailments" (R. 279) and its decision issued less than nine months later in the *Sayre Field* case holding that bailments and fungibility were not pertinent concepts under the Natural Gas Act and construing the

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[6] *Oklahoma Natural Gas Company,* 23 F. P. C. 291; *Shell Oil Company,* 25 F. P. C. 1316.

transaction as an exchange, and therefore a sale, cannot be reconciled. *We can only conclude that the decision in this case was arbitrary and discriminatory.*

The Commission observed that "* * * An essential feature of this transaction is that Texaco is the owner of the gas both at the beginning and the end of its journey from the wellhead to the point of ultimate consumption. * * *" and "* * * it is clear that the intermediate transactions result in returning the gas to the original producer-owner * * *." (R. 279). These statements are inaccurate in the sense that they overlook the fact that there are original sales in the field. For example, Texaco proposes to offer gas to Transco from its Paradis Gasoline plant. At that plant Texaco *purchases gas from other producers.* It is also possible under the contract for Texaco to purchase gas at other points in Louisiana and Texas and offer it for transportation. In addition, there is a sale in the field with respect to the Royalty Owners whose 1/8th interests in the gas must be purchased and paid for by Texaco when it delivers the gas to Transco. This sale transfers title to at least 1/8th of the gas to Texaco and Transco will not return any gas to the original Royalty Owners.

C. The continuous transportation of natural gas flowing in interstate commerce by Texaco from the point of delivery in New Jersey by Transco for approximately 4½ miles is a "transportation of natural gas" within the meaning of Section 1(b) of the Natural Gas Act.

We contend that the continuous transportation of the gas by Texaco is as much a jurisdictional transportation as Transco's transportation and that the Commission and the Court below erred in waiving the certificate requirement. The Texaco pipeline traverses streets and highways and is, for the most part, located on public and private property rather than on Texaco's refinery property. The

gas will be transported by Texaco at high pressures up to 250 lbs. for a distance of approximately four and one-half miles. Despite these facts the Commission held, and the Court agreed, that the Texaco pipeline was a "plant facility." The Court held that interstate commerce ceased when the transported gas was delivered to Texaco. It is our contention that the landmark case of *Federal Power Commission* v. *East Ohio Gas Co., et al.*, 338 U. S. 464 (1950), controls the point. As noted in the *East Ohio* case, the word "transportation" in Section 1(b) of the Act is not limited to companies which both transport natural gas in interstate commerce and sell it for resale. It applies to the *movement of interstate gas* in East Ohio's high pressure pipelines (338 U. S. 46). The *movement of the Transco interstate gas* does not cease upon delivery to Texaco at Transco's main pipeline but continues to move at high pressures until it reaches the refinery. It is only at that point that *the movement of interstate gas* can be held to have ceased.

In the *East Ohio* case this Court said:

> "* * * As we pointed out in *Panhandle Eastern Pipe Line Co.* v. *Public Service Comm'n*, 332 U. S. 507, 516 §1(b) made the Natural Gas Act applicable to three separate things: '(1) the transportation of natural gas in interstate commerce; (2) its sale in interstate commerce for resale; and (3) natural gas companies engaged in such transportation or sale.' And throughout the Act 'transportation' and 'sale' are viewed as separate subjects of regulation. They have independent and equally important places in the Act. Thus, to adopt respondents' construction would unduly restrict the Commission's power to carry out one of the major policies of the Act. Moreover, the initial interest of Congress in regulation of transportation facilities was reemphasized

> in 1942 by passage of an amendment to §7(c) of the Act broadening the Commission's powers over the construction or extension of pipe lines, 56 Stat. 83. This amendment followed a report of the Commission to Congress pointing out that without amendment the Act vested the Commission with inadequate power to make 'any serious effort to control the unplanned construction of natural-gas pipe lines with a view to conserving one of the country's valuable but exhaustible energy resources.' We hold that the word 'transportation' like the phrase 'interstate commerce' aptly describes the movements of gas in East Ohio's high-pressure pipe lines." (338 U. S. 468-469).

It seems apparent that neither the Commission nor the Court below considered the important distinction this Court recognized in the *East Ohio* case when it referred to the fact that the word "transportation", like the phrase "interstate commerce", describes *the movement of* gas in high pressure pipelines. Thus, to hold that "interstate commerce" ceased upon the delivery to Texaco, as the Court below did, is an interpretation of Section 1(b) of the Act that is too restrictive because it overlooks the fact that *the movement of interstate gas* continued in Texaco's high pressure pipeline.

The Commission, by refusing to assert its jurisdiction over the transportation in the State of New Jersey, has voluntarily created a regulatory gap which it usually deplores. It is unrealistic to expect that this gap in interstate transportation regulation will be closed by state action. Hence, the reasoning in *F. P. C.* v. *Transcontinental Gas Pipe Line Corp.* is apposite, 365 U. S. 1. At page 19 the Court said:

> "* * * Therefore, when a dispute arises over whether a given transaction is within the scope of federal or state regulatory authority, we are not inclined to approach the problem negatively, thus raising the possibility that a 'no man's land' will be created. * * *"

D. The Hearing Examiner committed prejudicial error when he used another docket before the Commission as the basis for conclusory findings resulting in the denial of "Fair Administrative Procedure".

After Transco filed its application in this case, designated Docket No. CP63-222, it filed a later application designated Docket No. CP64-96. This later filing was one of its usual annual filings to increase its sales and to seek authority for the construction of additional facilities. It became an uncontested proceeding under the Commission's shortened procedure in which no formal hearing is held. Thus, the Commission was able to issue its certificate in this later docket on April 17, 1964. The Hearing Examiner's decision in this proceeding was not issued until June 5, 1964. The Examiner's use of Docket No. CP64-96 caused him to commit two prejudicial errors in arriving at his decision, which was adopted by the Commission.

In the first error, the Examiner clearly recoginzed that one of the main bases for approval of the application *was the necessary finding that the proposed interruptible service would utilize idle capacity.* The Examiner was unable to make this finding from the evidence of record. Transco had simply failed to offer any evidence upon which the Examiner could make a finding on this crucial issue. He thus erroneously went to the later docket (CP64-96 on which no formal hearing was held) and used untested highly technical data to make his own computations and thus conclude that the necessary valley (idle) capacity existed

on the Transco system. In addition, the Examiner failed to include a significant portion of Transco's contract deliveries and thus his finding was not supported by "substantial evidence".

In his second procedural error, the Examiner preempted facilities from Docket No. CP64-96. He found, as Transco had contended, the cost of facilities herein to be constructed was $4,858,000. The Examiner then found that as the result of the Commission's certification in CP64-96 on April 17, 1964, permitting Transco to increase sales to customers, other than Texaco, that the Commission had somehow authorized sufficient capacity to serve Texaco in that docket, and thus, Transco needed only $600,000 worth of facilities in this proceeding (R. 176-178). This left $4,258,000 of Transco's estimated investment to be charged against Transco's existing customers. Therefore, the showing of economic feasibility is clearly *not* supported by "substantial evidence".

The above procedures used by the Hearing Examiner violate Section 556(d) of the Administrative Procedure Act. This Court has held that findings arrived at in such a manner cannot properly be made the basis of conclusory findings upon which to authorize a certificate (*Atlantic Refining Co.* v. *Pub. Serv. Comm'n*, 360 U. S. 393). The procedures invoked by the Examiner in relying on a separate docket to make his findings, completely deprived Petitioner of its rights to cross-examination and rebuttal on crucial matters subject to argument and capable of rebuttal. This was prejudicial error by the agency and denied a trial type hearing on the merits to Petitioner. The result was a denial of due process.

E. The evidence of record does not substantiate the findings that the present or future convenience and necessity *required* the issuance of the certificate within the meaning of Section 7(e) of the Natural Gas Act.

The Court below held that the Commission had given careful consideration to all the factors bearing on the public interest, but did not independently evaluate the conclusion of the Commission. We contend that the Court unduly restricted its consideration of the public interest factors in view of the Commission's *reversal* of its prior treatment of these same factors.

The decision of the Commission was inconsistent with the principles found by the Commission in the X-20 case and approved by the United States Supreme Court, *F. P. C.* v. *Transcontinental Gas Pipe Line Corp., et al.,* 365 U. S. 1. In the X-20 case, Transco proposed to furnish a similar transportation service for Consolidated Edison Company, one of its existing distribution company customers. Transco proposed to transport Consolidated Edison's gas from Texas to New York at its CD-3 rate, less Transco's average cost of gas. This is the exact same basis on which it would charge Texaco for the firm service proposed herein. Consolidated Edison would have used the gas, not for resale, but as here, in its own plant.

Consolidated Edison had to "offer or pay" for the transportation of 50,000 Mcf per day of its gas for 305 days per year. For the remaining 60 days of the year the transportation would be interrupted and Transco would sell 50,000 Mcf per day to Consolidated Edison for resale —*i.e.*, consumer gas instead of transportation gas.

Thus, it can be seen that Transco was proposing a combined transportation and peaking service, the benefits of which would inure to the customers of Consolidated Edison.

Despite these benefits, the Commission considered it *not in the public interest to certificate* X-20—*a fortiori* it should have denied the application herein because:

In the instant proposal, there is no peaking service. No consumers in the State of New Jersey will benefit by the availability of peaking gas for 60 days out of the year. Transco will not have the guaranteed take-or-pay-for revenues such as it contemplated under X-20 where Consolidated Edison had to "take or pay" for 50,000 Mcf per day for every day in the year for twenty years. There is no evidence that any savings which inure to Texaco will be passed along to gas consumers; whereas, in X-20, any savings by Consolidated Edison would inure to the benefit of its consumers.

Texaco intends to use a portion of the gas to be delivered as boiler fuel. We did not oppose certification on the basis of this end use of gas. However, it was one of the factors the Commission took into consideration in denying certification despite the fact that for 60 days in the winter the transportation of Consolidated Edison's own gas would be interrupted and Consolidated Edison would purchase Transco gas for resale to consumers. This "public interest" plus factor (in the X-20 case) is not present in the instant proposal.

In the light of the Court's holding in the X-20 case, it is not in the public interest for the Commission to unconditionally sanction a transportation arrangement of long term duration. It is patently discriminatory, where the Commission's policy denies an existing distribution company customer the right to make a much more favorable transportation arrangement, from a public interest standpoint, and then to sanction such an arrangement where public benefit was not proven. In sum, it is fair to say that the instant proposal has all of the defects and none of the benefits contained in the X-20 case.

The Commission found, and this Court upheld the finding in the X-20 case, that the proposal and similar proposals could have effects on the operation of pipeline facilities detrimental to the interests of the consumer since such proposed service would involve the preemption of pipeline capacity which would otherwise be available for the use of domestic consumers (365 U. S. pp. 5, 31).

In the present case, Transco not only has been authorized to preempt capacity for Texaco but also to use its "cheap expansibility" to the detriment of its distribution company customers.

The loss of "cheap expansibility" adversely affects Transco's present distribution company customers and should have been recognized by the Commission in determining the public interest. In *City of Pittsburg* v. *F. P. C.*, 237 F. 2d 741 (CADC), the Court reversed the Commission because it failed to consider the issue raised by Pittsburg that conversion of Texas Eastern's Little Inch line would deprive Texas Eastern's existing customers of capacity that could be used for future expansion. The Commission then recognized the validity of a similar contention in the case of *Mid-America Pipeline Company* v. *F. P. C., et al.*, 330 F. 2d 226 (CADC), and provided for a reduction in rates to compensate presently for a loss of cheap expansibility. In this case the Commission merely ignored this issue and made no attempt to compensate for the loss. Yet, it was even more important here that the Commission consider a *present* compensation for the loss of cheap expansibility because the Commission, contrary to its holding, does not have full jurisdiction over the transaction proposed by Transco because it does not have jurisdiction over the rate. Future protection cannot be assured by way of relative adjustment in Transco's rate or terms of service in a future rate proceeding (*United*

Gas Pipe Line Co. v. *Mobile Gas Serv. Corp.*, 350 U. S. 332; *F. P. C.* v. *Sierra Pacific Power Co.*, 350 U. S. 348 (1956)).

Because of the fact that Transco will not be able to unilaterally change the terms and conditions of the contract rate for the interruptible service and because of our belief that the terms of the agreement between Transco and Texaco are discriminatory as to Transco's existing customers, we contend that the Commission erred in finding that there was no need to make a careful scrutiny of the proposed rates and decide this issue, *ab initio*. *United Gas Co.* v. *Mobil Gas Serv. Corp.*, 350 U. S. 332. Where as here, unusual circumstances exist, the Commission should conduct a careful examination into rates. *Texas Eastern Transmission Corp.*, 24 F. P. C. 364, 394, *aff'd. sub nom; Ohio Fuel Gas Co.* v. *F. P. C.*, 296 F. 2d 594 (CADC).

There is no readily apparent basis for the Commission's reversal of its carefully considered policy determination in the X-20 case. Especially is this so in light of the fact that this case was given full consideration by this Court and this Court approved the Commission's findings and holdings in all respects.

The decision below, with respect to the other public interest specific findings, briefly referred to by the Court at 371 F. 2d 6 as having been decided on "careful consideration" by the Commission, is erroneous. Petitioner desires to reserve argument on these points for discussion on the merits in the event *certiorari* is granted.

F. Effect of decision below upon the administration of the Natural Gas Act and the gas industry.

This request for review presents several publicly important questions of interpretation of the Natural Gas Act calling for delineation by this Court of the statutory jurisdiction of the Commission. The decision below raises

the issue of whether *commingling alone* is a basis for jurisdiction. This issue has not heretofore been determined by this Court, *but should be,* because of the reluctance of the Appellate Court to apply the doctrine in this case. As a result, the Commission has read the Appellate Court's decision in this case as holding that *commingling is irrelevant* and thus it refused to assert jurisdiction over a sale in the field in *Florida Gas Transmission Company,* Docket No. CP65-393, Opinion No. 516, issued March 1, 1967 (slip opinion page 18). It is plain to all in the industry that the Commission's holding in this Transco-Texaco case and the extension of that holding to the *Florida Gas* case has opened up a "regulatory gap" which heretofore had been considered closed by a line of applicable decisions in this Court. In our opinion, the decision in the instant case is in conflict with the line of jurisdictional cases commencing with *Connecticut Light & Power Co.* v. *F. P. C.,* 324 U. S. 515 (1945) and continuing on through *Colton, Rayne Field, Lo-Vaca* and *Amerada.* The public interest issues decided below are in conflict with the decisions of this Court in *Catco* and X-20. The abnegation by the Commission of its jurisdiction in this case, as well as in the *Florida Gas* case, comes at a particularly unfortunate time because of the great concern of Federal, State and Municipal agencies with respect to abatement of air pollution. It is almost inevitable, with the continuance of the regulatory gap created herein, that pressures calling for the greater utilization of natural gas by large users of fossil fuel will result in higher prices to consumers. The possibility of a substantial unregulated market for the benefit of particular producers which would raise havoc with the regulatory scheme was clearly foreseen and foreclosed by this Court in *Lo-Vaca.* The possible creation of another substantial unregulated market is an issue that is squarely raised in the instant case. There are 14 major refineries on the

East Coast alone. Obviously, pipelines could create a substantial unregulated market by transporting gas to the refineries throughout the United States if the present decision is allowed to stand as a precedent. The Commission, by extending its denial of jurisdiction herein to the *Florida Gas* case, has created a tremendous unregulated market for the use of gas by electric generating utility companies. Having sanctioned the unregulated purchase and use of gas by Florida Power and Light Co., how can the Commission deny the many requests of the same general character that the Commission will receive for like service to other electric generating utility companies? And granting certification to pipelines to serve electric generating companies, what "fair or rational" basis, to use the Commission's own X-20 words, will the Commission have to deny large industrial users who will purchase their own gas in the field? The *expanding* regulatory gap which the Commission is now creating will inevitably result in higher prices for consumers.

An equally compelling reason for the granting of review in this case is the uncertainty with which the gas industry must contend because of the decision of the Court below. Does it mean that utility and industrial companies are free to exploit this regulatory gap by purchasing *gas in place* under this decision? Or is it only necessary to purchase the *gas in the field* under the Commission's extension of this case to its *Florida Gas* decision? On the other hand, the doctrine of commingling in the *Lo-Vaca* case may eventually be decided to be controlling by this Court. The observation of Justice Harlan in the *Lo-Vaca* case that the gas industry is entitled to know the fundamental ground rules by which it should conduct itself in this regard with some degree of predictability is clearly pertinent in view of the present confusion in the law (379 U. S. 376). How can the industry rely on Commission ac-

tion when the ground rules change with every case? For example, two of the basic reasons the Commission stated it relied on in denying certification to Consolidated Edison in X-20, in its own words were:

> "Certainly, if we were to grant this request we would soon be confronted with many requests of the same general character; and granting the X-20 proposal, we would have no fair or rational basis for denying similar such requests. Likewise, the authorization of this and like proposals would pre-empt for this usage capacity which would otherwise be available to meet more urgent and widely beneficial public needs, * * *" (21 FPC 141).

This rationale of the Commission, approved on review by this Court, apparently was no more than a whim, for the Commission completely disregarded these two cogent reasons for denial in *granting* certification in this case. Even while preparing this petition for certiorari, we find the Commission making another about-face and declaring that this case is a binding precedent compelling it to grant certification in the *Florida Gas* case. The Commission said:

> "We see no rational way to hold that commingling is irrelevant in Texaco-Transco and, at the same time find it fully controlling here. To make such a distinction would be to concede that form, not substance, controls us." (slip opinion p. 18)

The Commission's reasoning in X-20, *this case* (Transco-Texaco), and *Florida Gas* is indeed curious. In X-20 it places *great stress* on the importance of decisional precedence. In the instant case *no weight* is given to the argued precedential weight of this case for the future. In *Florida Gas*, the precedential value of the instant (Transco-Texaco)

case is of *compelling importance,* a surprising result in view of the fact that the Hearing Examiner considered he was confining his decision to the narrow limits of the facts in this case. In his view, this case was to be almost *sui generis* (R. 226-231). Commisisoner Ross, *who wrote the opinion for the Commission,* has now amplified his intent in this case by his dissent in *Florida Gas Transmission Co.*, Docket No. CP65-393, March 1, 1967. He stated at slip opinion, dissent p. 9, that Transco-Texaco (this case) was to be "a very narrow exception" to *Lo-Vaca.* It is evident that Commissioner Ross has now become somewhat disenchanted with his own opinion herein because at slip opinion, dissent p. 10, he states "* * * In view of the majority's holding today, I am now far from certain that reasonable exceptions can long remain exceptions." (*Florida Gas, supra*).

CONCLUSION

This case presents issues upon which the gas industry needs guidance and consumers need protection. The Court below, though holding against Petitioner on all issues, did concede that "the questions raised are not entirely free from difficulty" (370 F. 2d 3). For all the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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WILLIAM H. BLAKE,
J. HARRY MULHERN,
Of Counsel.

Dated: April 17, 1967

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15423

PUBLIC SERVICE ELECTRIC AND GAS COMPANY,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent.

TEXACO, INC. AND TRANSCONTINENTAL GAS
PIPE LINE CORPORATION,
Intervenors.

ON PETITION TO REVIEW ORDERS OF THE FEDERAL
POWER COMMISSION

Before HASTIE AND SMITH, *Circuit Judges,* and KIRKPATRICK, *District Judge.*

Argued February 25, 1966

Opinion of the Court

(Filed January 18, 1967)

By SMITH, *Circuit Judge.*

This matter is before the Court on a petition to review the action of the Federal Power Commission in granting

a certificate of public convenience and necessity to Transcontinental Gas Pipe Line Corporation (Transcon) under §§ 7(c) and (e) of the Natural Gas Act as amended, 15 U.S.C.A. §§ 717f (c) and (e). The petitioner assigns as error not only the granting of the said certificate but also the Commission's disclaimer of jurisdiction over Texaco, Inc., (Texaco). The questions raised are not entirely free from difficulty. It should be noted that the position of the petitioner is supported by six utility companies, granted leave to appear amicus curiae.

Relationship of Parties

Transcon is a "natural-gas company" within the meaning of § 2(6) of the Act, 15 U.S.C.A. § 717a(6), and as such is engaged in the transportation of natural gas in interstate commerce. It maintains transmission lines which extend from the Gulf Coast area of Texas and Louisiana to a terminus in New York. Texaco is a producer of natural gas and the owner of reserves located in the said area and in close proximity to Transcon's lines. It is also the owner and operator of an oil refinery in West Deptford, New Jersey, in close proximity to Transcon's lines. Public Service Electric and Gas Company (Public Service), a contract customer of Transcon, is a public utility engaged in the distribution and sale of natural gas. Its service territory includes West Deptford.

The primary interest of Public Service is in the alleged intrusion of Transcon into its territory and the possible loss of Texaco as a contract customer. The only interest of the other utility companies is the precedent allegedly established by the Commission's action and its possible impact on their future operations. Their common concern is economically motivated.

Appendix A

Facts

Contemplating a conversion of its refinery operations so as to permit the utilization of natural gas instead of oil as to an industrial fuel, Texaco entered into a contract with Transcon pursuant to the terms of which the latter agreed to transport natural gas owned by the former from mutually acceptable points in Texas and Louisiana to a point approximately four miles from the former's refinery in New Jersey. At this point Texaco would accept delivery and then tarnsport the gas through its own pipeline to its plant facility. Transcon agreed to bear the risk of loss while the gas was in its possession in transit, except for loss due to force majeure as defined by the contract. The proposed transportation service was made subject to such authorizations as were required by applicable law, including the Natural Gas Act.

Under the terms of the contract Texaco would make available to Transcon at the delivery points up to 8000 MCF (thousand cubic feet) per day for firm transportation and up to 16,000 MCF per day for interruptible transportation. However, Transcon would not be required to receive at the Texas delivery point a daily volume in excess of 10,000 MCF. It was contemplated by the parties, and their contract in effect so provided, that daily deliveries by Texaco at the said points would approximate daily redeliveries by Transcon at the specified point in New Jersey, operating conditions permitting. The proposed rate for the transportation of gas on an interruptible basis was 22 cents per MCF, the same rate charged to Sun Oil Company for a similar service. Since no issue is here made as to the rate for the transportation of gas on a firm basis it becomes irrelevant.

Appendix A

It was recognized by the parties, and their contract so provided, "that the natural gas delivered by Texaco for transportation . . . [would] necessarily be commingled in Transcon's pipeline system with gas received from other sources, and that the specific gas delivered to Transcon by Texaco [could not] be redelivered to Texaco." It was further agreed that gas redelivered by Transcon would be of merchantable quality and comparable to the gas delivered by Texaco to Transcon in the field.

Pursuant to the applicable provisions of the Act, Transcon made application to the Commission for authority to construct, install and operate additional pipelines, facilities and equipment necessary to the performance of the proposed transportation service covered by the contract. After extensive hearings the certificate of public convenience and necessity here in question was granted. Texaco filed no application and the failure of the Commission to require it to do os is a principal issue in this case.

Nature of Transaction

The first question for decision is whether Texaco was required by §7(c) of the Act, 15 U.S.C.A. 717f(c), to obtain a certificate of public convenience and necessity. The answer depends upon the nature of the transaction. If the contract is construed as contemplating a "sale in interstate commerce of natural gas for resale" within the meaning of §1(b) of the Act, 15 U.S.C.A. §717(b), then such a certificate was required. If the contract is construed as covering nothing more than a conventional arrangement for the transportation of natural gas for hire then the only aspect of the transaction subject to the Commission's jurisdiction was the transportation. The latter construction, adopted by the Commission, is here challenged as erroneous.

Appendix A

The parties to his proceeding admit that in the transportation operations gas delivered by Texaco to Transcon in the field would be commingled with gas purchased by Transcon for subsequent resale. The petitioner maintains that under these circumstances the arrangement between Texaco and Transcon would involve an exchange of gas made available by Texaco in the field for commingled gas ultimately redelivered by Transcon at West Deptford. With this as a premise it argues that the arrangement must be treated as involving a sale of gas in interestate commerce for resale, subject to the jurisdiction of the Commission. We do not agree. An essential ingredient of an exchange is a transfer of title, and this was clearly not intended by the parties. The arrangement between Texaco and Transcon would involve nothing more than the bailment of a fungible commodity. BROWN ON PERSONAL PROPERTY, 2d Ed. §78; 8 AM. JUR. 2d Ed., BAILMENTS, §40.

The argument advanced by the petitioner was answered by the Commission as follows:

> "We conclude that the mere physical commingling of Texaco's gas in Transco's lines with gas Transco has purchased for subsequent resale does not compel rejection of historic notions of bailments and require us to transform the transportation agreement into a succession of sales, by Texaco to Transco and again by Transco to Texaco. An essential feature of this transaction is that Texaco is the owner of the gas both at the beginning and the end of its journey from the wellhead to the point of ultimate consumption. It has merely contracted for conventional transportation arrangement subject to the Commission's jurisdiction."

The Commission went on to hold that under the circumstances Texaco's proposed operations were not subject to regulation.

The petitioner concedes that the contract is silent as to the transfer of title but contends that an intent to transfer title should be inferred from Transcon's agreement to assume the risk of loss while the gas was in its possession in transit. We find the contention to be without merit. Transcon contracted to furnish a conventional transportation service and the liability it agreed to assume was similar to that ordinarily imposed on the carrier of goods at common law. See *Commodity Credit Corporation* v. *Norton*, 167 F. 2d 161, 164 (3rd Cir. 1948); *United States* v. *Mississippi Valley Barge Line Co.*, 285 F. 2d 381, 388 (8th Cir. 1960); *L. E. Whitlock Truck Service, Inc.* v. *Regal Drilling Co.*, 333 F. 2d 488, 491 (10th Cir. 1964). A transfer of title is clearly not essential to the contractual assumption of this type of liability.

It seems to us that the petitioner's reliance on *California* v. *Lo-Vaca Co.*, 379 U. S. 366 (1965) is misplaced. Therein a producer of natural gas, having adequate resources in Texas, entered into two contracts with an interstate pipeline company engaged in the transportation and sale of gas in interstate commerce. The first of these provided for the sale of gas for subsequent industrial use in facilities maintained by the purchaser in Texas. The second provided for the sale of gas for subsequent industrial use in facilities maintained by the purchaser in New Mexico and Arizona, a transaction clearly subject to Commission jurisdiction under § 7(c) of the Act, *supra*. Pursuant to the terms of these contracts delivery was to be made to a subsidiary of the purchaser at a point in Texas. It was

understood by the parties that the gas purchased under these contracts would flow in a commingled stream with gas from other sources, a substantial portion of which would be resold in interstate commerce. The parties attempted by their contracts to evade Commission jurisdiction. The Court, affirming the decision and order of the Commission, applied the doctrine of commingling and held that the entire transaction was subject to jurisdiction. On facts similar to those in *Lo-Vaca*, the Court reached the same conclusion in *Federal Power Commission* v. *Amerada Petroleum Corp.*, 379 U. S. 687 (1965). The question here raised by the petitioner was not reached by the Court in either of the cited cases.

The claim to Commission jurisdiction in *Lo-Vaca* and *Amerada* was sustained on facts which are not present in the case now before us. Texaco is the producer and owner of gas which it proposed to use as an industrial fuel in its refinery at West Deptford. It contracted with Transcon for conventional transportation service for which the latter was to receive a fixed charge per MCF of gas transported. The arrangement would not involve either a sale by Texaco to Transcon or a resale by Transcon to Texaco. The expected commingling of gas owned by Texaco with gas purchased by Transcon for resale would not alter the substance of the transaction. We are of the opinion that under these circumstances the doctrine of commingling, as applied in *Lo-Vaca* and *Amerada*, has no application in the instant case because of the absence of a jurisdictional sale for either consumption or resale. Further, the arrangement between Texaco and Transcon was not devised to avoid regulation; in fact, the transaction was cast in a form which made it subject to the jurisdiction which the Commission properly assumed.

Appendix A

Continuity of Interstate Commerce

It is agreed that performance of the contract by Transcon would require redelivery of transported gas to a Texaco owned pipeline, a terminus of which is located approximately four miles from the refinery. Texaco would accept redelivery at the terminus and then transport the gas in its own pipelines to the refinery. The petitioner here argues, as it did before the Commission, that this transportation by Texaco would be "transportation . . . in interstate commerce," within the meaning of § 1(b) of the Act, 15 U.S.C.A. 717(b), for which a certificate of public convenience and necessity should have been required. In support of its argument the petitioner cites *Federal Power Commission* v. *East Ohio Gas Company,* 338 U. S. 464, which we believe to be distinguishable on its facts from the instant case.

The Commission, adopting the position taken by the Examiner on the issue, held that Texaco's pipeline was an integral part of its plant facility and that interstate commerce ceased when the transported gas was redelivered at the terminus. The Commission decided that under these circumstances a certificate of public convenience and necessity should not be required. This decision, with which we agree, is in accord with three earlier Commission decisions. *Anchor Hocking Glass Corp.,* 2 F. P. C. 930; *Jersey Central Power and Light Co.,* 9 F. P. C. 717; *Montana Power Co.,* 10 F. P. C. 950.

Challenge to Findings of Fact

The Examiner filed an initial decision in which he reviewed the evidence and summarized in detail the findings of fact upon which his ultimate conclusion to grant the

certificate rested. The decision "with respect to the public interest aspects of the application" was adopted by the Commission and exceptions thereto were denied. On a joint petition for rehearing filed by Public Service and the intervening utilities the objections to the Commission's order were considered and the petition was denied.

The petitioner challenges as erroneous specific findings relating to: the relationship of end use to the public interest; the preemption of available pipeline capacity; the alleged loss of cheap expansibility; the availability of valley capacity; the need by Texaco and the economic advantage to it of the proposed service; and, the settlement proposal submitted by Public Service. Although these findings are subject to review, they are conclusive if supported by "substantial evidence." § 19(b) of the Act, 15 U.S.C.A. § 717r(b); *Shell Oil Company* v. *Federal Power Commission*, 334 F. 2d 1002, 1012 (3rd Cir. 1964).

The administration of the Natural Gas Act has been entrusted to the Commission. We must therefore bear in mind the comprehensive authority vested in the Commission and the statutory limitation on the scope of review. It is the function of the Commission to evaluate the evidence, find the facts, and draw the inferences of which the relevant evidence is reasonably susceptible. But its function does not end there. It must bring to bear an expert judgment and determine "from its analysis of the total situation on which side of the controversy the public interest lies." *Federal Power Commission* v. *Transcontinental Gas Corp.*, 365 U. S. 1, 7 (1964). The Commission may exercise a veto power over proposed transportation but can do so only when a balance of all the circumstances weighs against certification. *Ibid.*, 17. It is the limited

function of the Court to determine whether, on a consideration of the record as a whole, the findings of fact are supported by "substantial evidence."

We have examined the record in its entirety and are convinced by our examination that the challenged findings of fact are based upon a thoughtful consideration of the evidence as a whole and a discriminating evaluation of competing factors. The decision of the Commission and its opinion on the petition for rehearing clearly indicate that careful consideration was given to all the factors bearing on the public interest.

The petitioners have advanced several arguments which we have not discussed. However, we have considered them and find them lacking in substantial merit.

The decision and order of the Commission will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 15,423

PUBLIC SERVICE ELECTRIC AND GAS COMPANY,
Petitioner,

vs.

FEDERAL POWER COMMISSION,
Respondent,

TEXACO, INC. and TRANSCONTINENTAL GAS PIPE LINE CORPORATION,
Intervenors.

ON PETITION FOR REVIEW OF ORDERS OF THE FEDERAL POWER COMMISSION

Present:

HASTIE and SMITH, *Circuit Judges*, and KIRKPATRICK, *District Judge*.

Judgment

This cause came on to be heard on the record from the Federal Power Commission, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the decision of February 17,

1965 and the order of April 16, 1965 of the Federal Power Commission in this case be, and the same are hereby affirmed.

ATTEST:

THOMAS F. QUINN
Clerk

March 2, 1967

APPENDIX B

Natural Gas Act

Sec. 1 (b) The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas. [52 Stat. 821 (1938); 15 U.S.C. § 717 (b)]

Sec. 7 (c) [2]No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will

be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. [52 Stat. 825 (1938), as amended, 56 Stat. 83 (1942); 15 U.S.C. §717f (c)][5]

Sec. 7 (e) [5] Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commis-

sion thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require. [56 Stat. 84 (1942); 15 U.S.C. § 717f (e)]

Sec. 19 (b) [9] Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States[10] for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the

Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in [former] sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, sec. 1254).

Administrative Procedure Act

§ 556. *Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision*

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the

agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.